commenced a completely unmeritorious action against the defendant. But the action has been dismissed with costs and the defendant could have commenced an action for damages for malicious prosecution. To adopt the words of Aickin J, it will be seldom that it will be just or equitable that the unsuccessful plaintiff should bear the burden of damages which were not foreseeable from circumstances known to him at the relevant time. The alleged damage suffered by the defendant was obviously too remote. The plaintiffs could not have been foreseen that the $10,000 which was meant for Sunna would have (i) become vested in the defendant (assuming this was the legal position since there was no evidence of an assignment of the funds and the plaintiffs did not request the defendant to pay Sunna and acquire the beneficial ownership of the cheque), (ii) that the defendant would have the supply contract and (iii) he would need the $10,000 to fulfil that contract.

*The evidence*

In view of my finding on causation, the evidentiary issues have become irrelevant in this appeal. However, I would like to make some observations on this ground of appeal. Firstly, the assistant registrar did not seem to have given any consideration to the arguments of counsel for the plaintiffs on the inadmissibility of some of the evidence adduced by the defendant. Secondly, he appeared to have accepted wholly the oral testimony of the defendant without considering their intrinsic improbability in the circumstances of the evidence known to him. This is regrettable. He admitted not only oral hearsay evidence but also documentary hearsay evidence over the objections of counsel for the plaintiffs. I will give a few examples. The evidence about the wife going to London to raise funds was hearsay. The wife did not give evidence nor was a single document produced to show how, when, from whom or how much was raised. The evidence that the defendant (and therefore his wife) had permanent homes in London was ignored in the assessment of the truthfulness of the defendant's evidence, even if it were admissible as his personal knowledge. The cash memo was not signed by the maker and therefore not admissible without the maker giving evidence that the defendant actually paid the R186,0000 and no receipt was tendered.

*'Damages' and costs/expenses*

For the reasons I have given, the cost of the wife's flight to London was neither a loss nor an expense which had any connection with the action or the injunction. All the expenses incurred by the defendant for which the assistant registrar has awarded to him as damages were in the nature of costs incurred in discharging the injunction and in defending the action. They were not damages sustained by reason of the injunction. They should be taxed as part of the party and party costs payable to him.

For the above reasons, I allow the appeal with costs here and below and set aside the order of the assistant registrar.

*Appeal allowed.*

Solicitors: *Muru Rajah & Partners; Khattar Wong & Partners.*

Reported by *Terence Tan Bian Chye*

## Hong Leong Finance Ltd v DBSL Properties Pte Ltd

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 170 OF 1989
CHAO HICK TIN JC
19 FEBRUARY 1990

*Land Law — Agreement for sale and purchase of land — Liability for outstanding property tax in respect of period before completion — Construction of contract to determine liability — Inconsistency between special and general conditions*

The plaintiffs, a finance company, were mortgagees of two pieces of land (the property). Following default on the part of mortgagors, the plaintiffs took possession of the property and put it up for sale by tender. PMPL submitted their tender. The plaintiffs accepted the tender of PMPL. Later, PMPL notified the plaintiffs that PMPL would transfer the property to the defendants. Before completion, a dispute arose between the parties as to who, under the contract, was responsible for the outstanding property tax in respect of the period. The parties agreed that the completion of the transaction be proceeded with as scheduled subject to the understanding that the issue be referred to the court for a decision. Prior to the submission of the tender, PMPL (and thus the defendants) were aware that there was outstanding property tax in respect of the property. The contract of sale and purchase was governed by a set of 'conditions of tender' (which the court shall refer to as the 'special conditions'). The parties then referred the matter to court to determine who should be liable for outstanding property tax in respect of the period prior to completion.

**Held**, declaring that the property tax should be borne by the defendants:

(1) Special condition 23 provided that the property was sold subject to 'all notices including notice of payment of property tax ...' and such notices 'shall be complied with and discharged by and at the expense of the successful tenderer'. In the court's view, the words 'at the expense of' were crucial. They clearly showed that by this provision it was intended that the purchaser was to be responsible for the payment of all outstanding property tax.

(2) The court was unable to accept the submission of the defendants that special condition 23 could be construed to mean that the purchasers, the defendants, were to pay the outstanding property tax first and that subsequently the defendants could seek the appropriate reimbursement from the vendors, the plaintiffs, in accordance with general condition 7.

(3) As a matter of construction, the court finds that there was a clear inconsistency between special condition 23 and

general conditions 6 and 7 (which are part of the Law Society's Conditions of Sale 1981). It followed, applying special condition 25 (which incorporated the Law Society's Conditions of Sale 1981 except where varied by the special conditions), that special condition 23 must prevail.

[*Editorial Note*: The defendants have appeal to the Court Appeal of vide Civil Appeal No 14 of 1990.]

**Case referred to**

1 *Kaolim Pte Ltd* v *United Overseas Land Ltd* [1983] 2 MLJ 1 (distd)

*Anthony Lee* for the plaintiffs.
*Deborah Barker (Ms)* for the defendants.

*Cur Adv Vult*

**Chao Hick Tin JC**: The plaintiffs, a finance company, were mortgagees of two pieces of land, together with the building erected thereon known as No 11, Beach Road, Singapore (hereinafter called 'the property'). Following default on the part of the owners/mortgagors and in exercise of their rights as mortgagees, the plaintiffs took possession of the property and put it up for sale by tender.

The sale was advertised in the Straits Times on 18 August 1988. On 26 August 1988, a set of tender documents was, at the request of Property Management Pte Ltd (PMPL), despatched to them. On 15 September 1988, PMPL submitted their tender for the property at a price of $25,600,000. On 16 September 1988, the plaintiffs accepted the tender of PMPL. On 14 October 1988, the solicitors for PMPL notified the solicitors for the plaintiffs that PMPL would transfer the property to the defendants. The parties also agreed that the date for completion of the sale and purchase was to be 23 November 1988.

However, before completion, a dispute arose between the parties as to who, under the contract, was responsible for the outstanding property tax in respect of the period prior to the date fixed for completion, ie 23 November 1988. Following consultations, the parties agreed that the completion of the transaction be proceeded with as scheduled subject to the understanding that the issue be referred to the court for a decision.

It was common ground between the parties that, prior to the submission of the tender, PMPL (and thus the defendants) were aware that there was outstanding property tax in respect of the property. PMPL had made enquiries and were so informed by the Property Tax Department of the state of the accounts.

The contract of sale and purchase was governed by a set of 'conditions of tender' which I shall hereafter refer to as the special conditions. For the purposes of the matter before me, the most relevant provisions were special conditions 23 and 25. Special condition 23 was as follows:

> The property is sold subject to (a) any scheme, layout, matter or thing embodied or shown in the General Improvement Plan and/or the Master Plan and all proposed amendments or additions thereto; (b) any proposed scheme affecting the Property; and (c) all notices *including notices for payment of property tax* and maintenance and service charges, charges and claims affecting the property made or served whether before on or after the date of tender. The successful tenderer shall be deemed to have purchased with full knowledge and notice of all such schemes or proposed schemes, layouts, matters, things, notices, demands, charges and claims *which shall be* complied with and *discharged by and at the expense of the successful tenderer* who shall not be entitled to make or raise any objection or requisition whatsoever in respect thereof. (Emphasis added.)

Special condition 25 incorporated the Singapore Law Society's Conditions of Sale 1981 in these terms: 'the parties hereto shall be bound by the general conditions of sale known as the Singapore Law Society's Conditions of Sale 1981 so far as the same are applicable to a sale by private treaty and are not varied by or inconsistent with the conditions herein.' I shall hereafter refer to these Law Society's conditions as the general conditions.

The provisions of the general conditions which were relevant were general conditions 6 and 7 and they read as follows:

> 6 The outgoings will be discharged by the vendor down to but excluding the date fixed for completion, as from which day all outgoings shall be discharged by and the rents and profits or possession shall belong to the purchaser, (such outgoings, rents and profits, if necessary, being apportioned) but the purchaser shall nevertheless not be let into actual possession or receipt of rents and profits until completion of the purchase, and the purchaser shall on completion pay to the vendor a due proportion of the current rents less the like proportion of the current outgoings.
>
> 7 The vendor shall pay for all property tax (including surcharge thereon) down to but excluding the day fixed for completion, whether such tax shall have been levied or (as the case may be) increased before on or after completion and the vendor shall indemnify the purchaser in respect of the same. The provisions herein shall not merge in the conveyance/transfer by the vendor to the purchaser.

As can be seen, special condition 23 provided that the property was sold subject to 'all notices *including notice of payment of property tax* and maintenance and special charges'. That condition went on to say that the successful tenderer would be deemed to have purchased with full knowledge and notice of all such notices which 'shall be complied with and discharged by and at the expense of the successful tenderer ...'. The plaintiffs contended that in so far as the payment of outstanding property tax was concerned, special condition 23 was very clear; the burden was placed on the successful tenderer who must no doubt take that into account in submitting his tender. They said that there was clearly a conflict between special condition 23 and general conditions 6 and 7. And applying special condition 25, special condition 23 must prevail.

On the other hand, the defendants submitted that under common law all outgoings relating to immovable property should be apportioned between the vendor and the purchaser in accordance with the date of completion. Counsel for the defendants cited authorities to show that rates and taxes had always been regarded as outgoings of property, eg *Williams on Title* (19th Ed) at p 538. I did not think that that proposition could be disputed. In any event, having regard particularly to general condition 7, this point was put beyond any peradventure. The defendants' counsel also explained that as between general condition 6 and general condition 7 there was no inconsistency. The only significant difference was that in regard to property tax, general condition 7 went one step further and provided that even in respect of a notice which was issued by the relevant authorities after the purchase had been completed, the parties would still be governed by the same rule, ie apportionment as at the date of completion, and the vendor was obliged to indemnify the purchaser accordingly.

Counsel for the defendants next submitted that it was possible to reconcile special condition 23 with general condition 7. She put it this way. What special condition 23 sought to do was to require the successful tenderer to pay all outstanding property tax first and the parties should then make the necessary adjustment in accordance with general condition 7. In any event, she averred that if there was any ambiguity as to the scope and meaning to special condition 23, it should be construed, applying the contra proferentem rule, in favour of the purchaser.

To determine whether there was any inconsistency between general conditions 6 and 7 on the one hand and special condition 23 on the other, it was necessary first to examine special condition 23. It could not be disputed that special condition 23 was very wide in its terms. It covered a large number of incidents or situations but for our present purposes I would just confine myself to the question of property tax. First, it expressly said that the property sold was subject to notices for payment of property tax whether made or served before, on or after the date of tender. Secondly, it provided that the successful tenderer was deemed to have knowledge of such notices; and here I would just repeat what I have observed above, ie the defendants did have actual knowledge of the outstanding property tax. Thirdly, it said that such notices 'shall be complied with and discharged by and *at the expense of* the successful tenderer'. In my view, those words that I have just emphasized were crucial. They clearly showed that by this provision it was intended that the purchaser was to be responsible for the payment of all outstanding property tax. I was unable to accept the submission of the defendants that this special condition could be construed to mean that the purchasers, the defendants, were to pay the outstanding property tax first and that subsequently the defendants could seek the appropriate reimbursement from the vendors, the plaintiffs, in accordance with general condition 7. I found it extremely difficult to give the words 'at the expense of' any other interpretation without doing violence to their plain meaning. In my view, the contra proferentem rule could have no application where a provision was clear. It followed, therefore, that as special condition 23 (in so far as payment of outstanding property tax was concerned) was in conflict with general conditions 6 and 7, the former must prevail.

Counsel for the defendants relied largely on the local case of *Kaolim Pte Ltd* v *United Overseas Land Ltd*[1] which went all the way to the Privy Council. There, very briefly, a mortgagee-bank sold land by tender in respect of which there was outstanding property tax. The issue there, which was similar to the present case, was: should it be the vendor or the purchaser who should bear the outstanding property tax in respect of the period prior to the completion date? The relevant provisions there, which were broadly similar to the provisions in the present case, were the following:

> Special Conditions
>
> 16 The property is sold subject to ... (c) all notices, charges, orders of court, charging orders, caveats and court or other claims affecting the property made or served whether before on or after the date of sale. The purchaser shall be deemed to have purchased with full knowledge and notice of all such schemes or proposed schemes, layouts, notices, demands, charges, orders of court, charging orders, caveats and court or other claims which shall be complied with and discharged by and at the expense of the purchaser who shall not be entitled to make or raise any objection or requisition whatsoever in respect thereof.
>
> General conditions
>
> 6 The outgoings will be discharged by the vendor down to the day fixed for completion, as from which day all outgoings shall be discharged by and the rents and profits or possession shall belong to the purchaser, (such outgoings, rents and profits, if necessary, being apportioned) but the purchaser shall nevertheless not be let into actual possession or receipt of rents and profits until completion of the purchase, and the purchaser shall on completion pay to the vendor a due proportion of the current rents less the like proportion of the current outgoings.
>
> 34 In case of conflict or repugnancy between the above conditions and any special conditions imposed on any sale, the special conditions shall prevail and the above conditions shall be deemed to be modified so far only as is necessary to give full effect to such special conditions.

It would appear that in *Kaolim*,[1] the case was argued on the basis that the outstanding property tax constituted a charge on the property and that the mortgagee-bank was in effect selling as second mortgagee. Their Lordships, having considered the contract as a whole and taking into account both the special conditions and general conditions, had no difficulty in excluding a charge, the subject matter of which was specifically dealt with in general

condition 6, from the purview of special condition 16. They then went on to hold that as property tax was an outgoing and as that was expressly dealt with by general condition 6, that provision applied and not special condition 16. It seemed to me that that was primarily how the two provisions were reconciled by the Privy Council though it also referred to a certain illogical consequence if the two provisions were not so reconciled. Their Lordships did not have to consider the meaning of the phrase 'shall be complied with and discharged by and at the expense of the purchaser' in special condition 16.

A comparison of our present special condition 23 with special condition 16 in *Kaolim*'s case[1] showed that though the two provisions were substantially similar there was a very significant difference. This was the addition of the phrase 'including notices for payment of property tax'. In my judgment, the inclusion of these words in special condition 23 distinguished the present case from *Kaolim*.[1] As pointed out above, their Lordships in *Kaolim*[1] went on the premise that as special condition 16 there was a general provision and as general condition 6 distinctly dealt with 'outgoings', which expression as a matter of general interpretation would include property tax, the two provisions could be reconciled on the basis that special condition 16 did not apply to the incident of property tax which was specifically dealt with in another part of the contract. But with the addition of that phrase in special condition 23 in the present case, I must confess that I found great difficulty in effecting any reconciliation between special condition 23 and general conditions 6 and 7 in so far as property tax was concerned. Indeed, applying the primary reasoning in *Kaolim*[1] to its logical conclusion, this court must, as a matter of construction, find that there was a clear inconsistency between special condition 23 and general conditions 6 and 7. It followed, applying special condition 25, that special condition 23 must prevail.

In the result, I declared that the outstanding property tax in respect of the period prior to the date of completion would have to be borne by the defendants. Costs were fixed at $6,000 and payable by the defendants to the plaintiffs.

*Order accordingly.*

Solicitors: *Allen & Gledhill; Khattar Wong & Partners.*

Reported by *Terence Tan Bian Chye*

# MALAYSIAN REPORTS

## Eu Finance Bhd lwn Sim Sen Organization Bhd

MAHKAMAH TINGGI (KUALA LUMPUR) — SAMAN PERMULAAN NO F1015/85
ABDUL RAZAK H
5 APRIL 1990

*Undang-Undang Tanah — Jualan lelong — Harga rizab — Penilaian — Penggadai ingkar menyelesaikan pinjaman — Permohonan oleh pemegang gadaian untuk perintah jualan — Harga rizab ditetapkan oleh pendaftar — Penilaian oleh penggadai lebih tinggi — Pendaftar enggan menggunakan penilaian yang lebih tinggi — Asas pendaftar dalam penilaiannya — Samada jualan lelong mesti diketepikan*

Ini adalah permohonan oleh defendan untuk jualan lelong tanahnya, lot 4822, geran no 12832, mukim Batu, oleh plaintif diketepikan dan pembeli tanah tersebut dijadikan suatu defendan serta disekat oleh injunksi daripada membeli tanah tersebut dan juga suatu harga rizab baru ditetapkan mengikut s 257(1)(d), Kanun Tanah Negara 1965. Defendan berhutang sebanyak $767,143 kepada plaintif dan telah menggadai tanah tersebut kepada plaintif sebagai cagaran. Oleh kerana defendan gagal membayar hutang tersebut, plaintif telah memperolehi suatu perintah jualan. Nampaknya tidak ada notis yang diserahkan kepada pihak tuan tanah di bawah s 258 Kanun Tanah Negara 1965. Pihak pendaftar telah menetapkan harga rizab sebanyak $800,000 di bawah s 257. Permohonan defendan untuk menukarkan harga $800,000 itu kepada $1,500,000 berasaskan laporan penilaiannya, ditolak oleh penolong kanan pendaftar. Soalan untuk diputuskan ialah atas asas apakah pendaftar menetapkan harga sebanyak $800,000 itu. Plaintif mengasaskannya kepada lapuran penilaiannya. Tetapi lapuran itu bukan satu lapuran yang formal dan ia tidak menyebut asas dengan mana nilai itu dicapai.

**Diputuskan,** membenarkan permohonan defendan:

(1) Penilaian yang dibuat yang tidak menunjukkan bagaimana harga itu telah dicapai adalah tidak teratur dan boleh mengelirukan. Sekurang-kurangnya ia patut menyatakan bahawa harga itu adalah hasil dari perbandingan jualan-jualan yang telah lalu. Tanpa bukti-bukti itu maka sehabis-habisnya harga yang dikemukakan itu adalah satu andaian yang tidak berasas sahaja. Seksyen 257 itu menyatakan pihak penolong kanan pendaftar hendaklah menetapkan anggaran nilaian pasaran (estimated market value) bagi menentukan harga yang akan dilelong setelah perintah mahkamah melelong itu dibuat. Perkatan 'anggaran' itu tidak memberi makna jika harga yang dianggarkan itu tidak mempunyai asas nilaiannya (basis of valuation).

(2) Perkataan 'nilaian pasaran' itu sering dibangkitkan di dalam kes-kes pengambilan tanah di mana ia disebut sebagai harga yang diterima dengan suka hati (willing) oleh seseorang penjual dan pembeli di pasaran terbuka. Apabila menetapkan anggaran nilaian pasaran (estimated market value), penolong kanan pendaftar perlulah mengambil kira bukan sahaja pendapat pihak yang mendapat perintah mahkamah supaya tanah itu dilelong atau dijual, tetapi juga pihak tuan tanah yang terbabit.

[*Nota Penyunting*: Pihak plaintif telah membuat rayuan kepada Mahkamah Agung menerusi Rayuan Sivil No 03-47-90.]